

Supreme Court, U. S.
FILED

SEP 30 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No. 76-307

JOHN J. WOLERY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION**

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TION MAY BE BASED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

2. DOES THE FAILURE TO WARN A POTENTIAL WITNESS OF *MIRANDA* RIGHTS VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHERE A THIRD PARTY BECOMES A CRIMINAL DEFENDANT AND THE WITNESS TESTIFIES FOR THE STATE AT THE DEFENDANT'S TRIAL?
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STATEMENT OF THE CASE

In August, 1973, a special Grand Jury for Franklin County, Ohio, returned indictments against 41 separate individuals, totaling 178 counts, for various burglary and theft related offenses.

Petitioner was one of those 41 individuals, having been indicted for eight counts of receiving and concealing stolen property, in violation of Section 2907.30,

Ohio Revised Code.¹

Detectives of the Columbus Police Department had been contacted by Hal C. Strobel, who was being held in the City Prison on a pending charge of receiving stolen property. Strobel stated he had information about a burglary and theft ring operating in Franklin County, Ohio, and Central and Southern Ohio. Through Strobel, his wife Cindy and Donald K. Johnson, who possessed similar information, came to the attention of the police department.

As potential witnesses, Strobel and Johnson were interviewed, and such interviews were conducted without the benefit of the prophylactic *Miranda* warnings or waiver of such rights.

Petitioner was one of the 41 persons implicated by Strobel and Johnson as a result of these interviews.

Strobel and Johnson were not charged with any criminal offenses which were discussed in these interviews. At a later date, a Judge of the Court of Common Pleas signed an entry granting immunity to Strobel and Johnson.

As the investigation continued, another witness, Lester Compton, who had knowledge of petitioner's criminal activities, was located. Compton entered a plea of guilty to a reduced charge in exchange for his information and testimony against petitioner.

The case against petitioner commenced before a jury on November 5, 1973.

The state presented twenty-three witnesses and in-

¹ Section 2907.03, Revised Code, repealed effective January 1, 1974, provided: "No person shall buy, receive, or conceal anything of value which has been stolen, taken by robbers, embezzled, or obtained by false pretense, knowing it to have been stolen, taken by robbers, embezzled, or obtained by false pretense."

troduced eighteen exhibits. The promises of immunity to Strobel and Johnson, and Compton's guilty plea to the reduced charge, were fully disclosed to the jury at the trial.

One count of receiving stolen property was dismissed at the close of the state's case, petitioner was found not guilty of three counts of receiving stolen property, and the jury returned a verdict finding petitioner guilty of four counts of receiving stolen property.

The judgment of conviction was affirmed by the Court of Appeals for Franklin County, Ohio, Tenth Appellate District.

The Ohio Supreme Court granted petitioner's motion for leave to appeal and unanimously affirmed the conviction.

REASONS FOR DENYING THE WRIT

1. THERE IS NO VIOLATION OF THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT WHERE STATE LAW PERMITS A CRIMINAL CONVICTION BASED UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE

It has long been the law in the State of Ohio that, absent a statute which provides otherwise, a criminal conviction may be based solely on the uncorroborated testimony of an accomplice. *Allen v. State*, 10 Ohio St. 287 (1859); *State v. Flonnory*, 31 Ohio St. 2d 124 (1972). At the time of petitioner's trial, no statutory proscriptions applied to this case.

This Ohio rule with respect to corroboration of accomplice testimony is in accord with federal deci-

sions and with the rule in 47 of 49 states.²

In *Caminetti v. United States*, 242 U.S. 470 495 (1917), this Court stated:

"[T]here is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."

It should be noted that while in *Caminetti* the trial court failed to give a cautionary instruction relative to accomplice testimony, that herein the trial court specifically instructed the jury to examine accomplice testimony with caution. In addition, the promises of immunity and reduced charges were fully disclosed to the jury pursuant to *Giglio v. United States*, 405 U.S. 150 (1972) as matters affecting the credibility of the accomplices.

The Respondent submits that the Fourteenth Amendment does not bar a criminal conviction based upon the uncorroborated testimony of an accomplice.

2. THE FAILURE TO GIVE *MIRANDA* WARNINGS TO A POTENTIAL WITNESS DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL OF A THIRD PARTY WHO BECOMES A CRIMINAL DEFENDANT AND THE WITNESS TESTIFIES FOR THE STATE AGAINST THAT DEFENDANT.

The prophylactic rules of *Miranda* are designed to protect the Fifth and Sixth Amendment rights of a suspect during in-custodial interrogation.

Absent compliance with *Miranda* and waiver of those rights, the statements of the suspect may not be introduced in the state's case in chief at the suspect's trial.

² See cases cited in *State v. Wolery*, *supra.*, at 330, footnote 8.

Herein, the witnesses who were interviewed without benefit of *Miranda* warnings were not charged with any criminal offenses discussed by them and such statements, therefore, were not, and could not be, introduced at a trial against them.

However, such witnesses did appear in person at petitioner's trial and testify for the state against petitioner. In the interim, a Judge of the Court of Common Pleas had signed an entry granting immunity to the witnesses Strobel and Johnson.

The Fifth Amendment privilege against self-incrimination is personal to the witness, *Hale v. Henkel*, 201 U.S. 43 (1906), and cannot be asserted on behalf of the witness by the petitioner. Whether the witnesses were given *Miranda* rights or not, is no concern to the petitioner as he is in no position to assert the constitutional rights of others.

Although petitioner had represented both witnesses in the past, Strobel requested and met with a public defender prior to the interviews.

The failure to give *Miranda* warnings to the witnesses and the purported grant of immunity violated no right of petitioner.

This procedure, the promise of immunity to the witnesses, and the court order of immunity were fully disclosed to the jury and affected the weight to be given to such testimony not its admissibility.

Contentions based upon violation of due process, equal protection, or right to a fair trial are equally without merit.

The failure to give *Miranda* warnings did not serve to deny due process to petitioner. Both witnesses ap-

peared personally at petitioner's trial, were subject to cross-examination and all deals were fully disclosed. Petitioner was given the full measure of due process of law before twelve of his peers who believed the testimony of the state's witnesses and disbelieved his testimony.

Respondent submits that the failure to give *Miranda* warnings to potential witnesses does not deny due process to a third party who subsequently becomes a criminal defendant and such witness testifies at the trial.

Fundamental fairness and the right to a fair trial are not impaired when the potential witness who is interviewed without *Miranda* warnings, later testifies against a third party who becomes a criminal defendant.

Finally, as to petitioner's equal protection claim, the record shows that this was not an effort to focus on petitioner, but rather, 40 other persons were indicted based on the interviews conducted and there is no evidence of selectivity

"deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Newman v. United States*, 382 F. 2d 479 (C. A. D. C. 1967).

For those reasons, the Respondent submits the Writ should be denied.

3. THERE IS NO VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION MERELY BECAUSE THE DEFENDANT IS THE FORMER ATTORNEY FOR A STATE'S WITNESS WHICH

WITNESS TESTIFIES UNDER A PROMISE
OF IMMUNITY AND SUCH IS FULLY
DISCLOSED TO THE JURY.

The testimony of witnesses Strobel, Johnson and Compton, if believed, fully supports petitioner's conviction for receiving stolen property.

The promises of immunity to Strobel and Johnson, and Compton's guilty plea to a reduced charge, were fully disclosed to the jury as affecting credibility.

The jury obviously believed the state's witnesses. Merely because petitioner is the former attorney for those witnesses does not vitiate the conviction on due process grounds nor does this former relationship so shock the conscience as to render the conviction void.

Petitioner's prior relationship with these witnesses is not grounds to grant the writ and Respondent submits that the writ should be denied.

CONCLUSION

For each of the reasons set forth herein, the respondent respectfully submits that the petition for Writ of Certiorari should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon Donald L. Billman, Esquire, of Billman and Wolery, counsel for the petitioner, by mailing same to his office at 915 South High Street, Columbus, Ohio 4325, by United States Mail, postage prepaid, this _____ day of September, 1976. I further certify that all parties required to be served have been served.

JAMES J. O'GRADY
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